Supreme Court, U.S.
FILED

96 72 JUL 1 1 1996

OFFICE OF THE CLERK

DOCKET NUMBER_____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

CITY OF JASPER, ALABAMA

VS.

CIVIL SERVICE BOARD OF THE
CITY OF JASPER, ALABAMA

ON PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT FOR THE STATE OF ALABAMA

PETITION FOR WRIT OF CERTIORARI

SUBMITTED BY:

JERRY K. SELMAN
SELMAN & SELMAN
ATTORNEY FOR PETITIONER
P.O. BOX 2388
JASPER, ALABAMA 35502-2388
(205) 384-5141

54 pp

QUESTION PRESENTED FOR REVIEW

Should a party appearing for trial before an administrative board have the right to voir dire the members of the board, as to bias, prejudice, promises made as to the outcome of the proceeding and other matters that could affect their qualifications to sit as fair and impartial triers of fact in the matter pending before the board?

PARTIES TO THE PROCEEDING

PETITIONER -

City of Jasper, Alabama, a municipal corporation.

RESPONDENTS -

Civil Service Board of the City of Jasper, Alabama, its members, and Lieutenant Kenneth Burkett who was the subject of the action in question before the Civil Service Board.

TABLE OF CONTENTS

Page

Question Presented for Review i

Parties to the Proceeding ii

Table of Contents iii

Table of Cited Authorities iv

Citation of Reports of Opinions vi

Basis for Jurisdiction vii

Statement of the Case 1

Argument 5

Appendix 14

TABLE OF CITED AUTHORITIES

Board of Dental Examiners v. King, 364 So. 2d 311 (Ala. Civ. App. 1977) 10

Chandler v. City of Lanette, 424 So.2d 1307 (Ala. 1982) 6

City of Jasper v. Civil Service Board of the City of Jasper, 1995 Ala. Civ. App. Lexis 571 . . . . . 9, 11

Ex Parte Greenberg, 395 So.2d 1000 (Ala. 1981). . . 6

In Re Murchison, 349 U.S. 133, 75 S.Ct. 623, 99 L.Ed. 942 (1955) 5

Knight v. State, 1995 Ala. Crim. App. LEXIS 243 . . . . . 6, 10

McLain v. Routzong, 608 So. 2d 722 (Ala. 1992) . . 6, 9

Offutt v. United States, 348 U.S. 11, 75 S.Ct. 11, 99 L.Ed. 11 (1955) 6

Tumey v. State of Ohio, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927) 5, 6

Ward v. Village of Monroeville, Ohio, 409 U.S. 57, 93 S.Ct. 80, 34 L.Ed.2d 267 (1967). 5, 11

Withrow v. Larkin, 421 U.S. 35, 95 S.Ct. 1456, 43 L.Ed. 2d 712 (1975) 10

Other Authorities:

Act No. 113, Acts of Alabama 1965
(1st Sp. Sess.) § 14 . . . . . 1, 3, 7, 10

28 U.S.C. §1257 vii

Rules of the Supreme Court vii

CITATION OF REPORTS OF OFFICIAL AND UNOFFICIAL OPINIONS AND ORDERS ENTERED IN THIS CASE

* Ruling of Civil Service Board of the City of Jasper, Alabama is unreported but is included in Appendix at page 16.

* Final Judgment of the Circuit Court of Walker County, Alabama in case number CV-93-67 (appeal of ruling of Civil Service Board of City of Jasper) is unreported but is included in Appendix at page 22.

* Order denying Petitioner's Motion for New Trial in the Circuit Court of Walker County, Alabama case number CV-93-67, denied by operation of law, is unreported and non-existent in any form.

* Opinion of Alabama Court of Civil Appeals in case number 2940115, 1995 Ala. Civ. App. LEXIS 571, included in Appendix at page 24.

* Opinion of Alabama Court of Civil Appeals in case number 2940115, 1995 Ala. Civ. App. LEXIS 695, denying Petitioner's Application for Rehearing, is included in Appendix at page 31.

* Certificate of Judgment of the Supreme Court of Alabama, denying Petition for Writ of Certiorari in case number 1950486 on April 12, 1996, as of yet unreported but is included in Appendix at page 32.

BASIS FOR JURISDICTION IN THIS COURT

This Court has jurisdiction under 28 U.S.C. §1257.

Petitioner is requesting this Court to review the judgment of the Supreme Court of Alabama in case number SC 1950486 wherein the City of Jasper, Alabama's Petition for Writ of Certiorari was denied on **April 12, 1996**. Rehearing is not permitted from the denial of a Petition for Writ of Certiorari before the Supreme Court of Alabama. See *Alabama Rules of Appellate Procedure*, Rule 39(j).

The question presented to this Court for review appears to be one contemplated by Rule 10 (c) of the *Rules of the Supreme Court of the United States* in that the Supreme Court of Alabama has decided an important question of federal law that has not been but should be, settled by this Court.

STATEMENT OF THE CASE

Lieutenant Kenneth Burkett was terminated from his employment with the City of Jasper, Alabama for being absent without leave from his position as an officer with the City of Jasper's police department. Mr. Burkett appealed his discharge to the Civil Service Board of the City of Jasper, Alabama (an Administrative Board created by an act of the Legislature of the State of Alabama and reported as *Act No. 113, Acts of Alabama 1965 [1st Sp. Sess.]*).

Shortly before the scheduled hearing, talk began to circulate that one or more of the board members had given assurances to Mr. Burkett that they would decide in his favor and that he would get his job back.

On the day of the hearing, the City requested permission to voir dire the panel (Civil Service Board) "to see if the board is going to be able to give us a fair hearing in this matter" (C-191).

Counsel for the City then stated,

> "Let me tell you, if I may, the questions I intend to ask. It has come to my attention that there has been certain talk that the board has already reached a determination on this matter, it has already been stated that the outcome will be unfavorable to the city. The first question I wanted to ask each of the board members was whether or not they've discussed this matter among themselves or not. And the next question I wanted to ask was whether or not

they have already reached a decision or tentative decision, and also I wanted to ask each of the board members if they had spoken to Mr. Kenneth Burkett or anyone on his behalf either before November 18 or after November 18th" (C-192-193).

"Well there are other questions I want to ask them. The first one was I wanted to ask of Mr. Middleton, what his relationship is to Mr. Burkett. I under-stand he has some relationship to Ken. I think it would be appropriate to know at this time" (C-195).

"I have one other question and it goes to this, in the act it says that the board shall be made up of qualified electors and if a person has been convicted of a crime of moral turpitude, he loses his right to vote and therefore is no longer a qualified elector. It's my understanding that the law in the State of Alabama is that a person who is convicted of a bad check matter is a person who has been convicted of a crime involving moral turpitude, and I would like to ask any of the members of the panel if they have ever been convicted of issuing a worthless check under the Code of Alabama" (C-196).

The City was denied the opportunity to ask any of the above questions (C-193,195,196).

In an effort to persuade the tribunal to allow voir dire on the above subject matters counsel for the City said,

> "Particularly in light of the fact of the way that the civil service act is written, one provision of which says, 'The findings of fact of this board are conclusive on appeal'. . . it becomes paramount that the City of Jasper and the complainant, Mr. Burkett, know that they had a level playing field on which to carry out this trial. And particularly, in light of some statements that have been made to me in regard to a decision having already been reached and what the decision would be in spite of whatever the testimony might be, I think that it would be proper that I be able to ask the panel of any such bias. I think that would be an issue on appeal or an issue on a Writ of Mandamus" (C-193-194).

Pursuant to the Civil Service Act of the City of Jasper, *Act No. 113, Acts of Alabama 1965 [1st Sp. Sess.]*, the finding of fact of the Civil Service Board is conclusive on appeal (C-193).

The due process issue dealing with the right to voir dire was properly raised at each stage in the proceeding.

This issue was timely raised on appeal to the Circuit Court of Walker County, Alabama (C-47-49); later on Motion for New Trial (C-341); and, subsequently on appeal to the Court of Civil Appeals of Alabama when the Petitioner in its "Statement of the Issues" asked the following:

> "(1) Is it reversible error for the Civil Service Board of the City of Jasper to not allow counsel for the City to voir dire the Members of the Civil Service Board on matters relating to bias in favor of or against either party appearing before it on that date?"

The issue was raised the last time on Petition for Writ of Certiorari to the Alabama Supreme Court when the City of Jasper raised the issue as follows:

> "(1) The basis of this petition for the writ is that a material question requiring decision was one of first impression in the appellate courts of Alabama and was incorrectly decided. The issue that the appellate court failed to properly address is whether a party to a cause has the right to voir dire the panel of an administrative body, prior to the hearing, as to issues of bias, prejudice, and other matters that might affect their qualifications to sit as triers of fact and to fairly try the matters before them."

In each instance these courts found against the due process right of the City of Jasper, Alabama to voir dire the members of the board as requested.

ARGUMENT

Question - Should a party appearing for trial before an administrative board have the right to voir dire the members of the board, as to bias, prejudice, promises made as to the outcome of the proceeding and other matters that could affect their qualifications to sit as fair and impartial triers of fact in the matter pending before the board?

The right to have a neutral and detached decision-maker to preside over cases has long been recognized as a fundamental guarantee of due process. See *Ward v. Village of Monroeville, Ohio*, 409 U.S. 57, 93 S.Ct. 80, 34 L.Ed.2d 267 (1972); *In re Murchison*, 349 U.S. 133, 75 S.Ct. 623, 99 L.Ed. 942 (1955); *Tumey v. Ohio*, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927). This requirement affords fairness to all parties involved in the case. The concept of a "fair trial in a fair tribunal" was expressed best in the case of *In re Murchison*, 349 U.S. at 136, 75 S.Ct. at 625:

> "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. Circumstances and relationships must be considered. This Court

> [the Supreme Court of the United States] has said, however, that 'Every procedure which would offer a possible temptation to the average man as a judge * * * not to hold the balance nice, clear, and true between the State and the accused denies the latter due process of law.' *Tumey v. State of Ohio*, 273 U.S. 510, 532, 47 S.Ct. 437, 444, 71 L.Ed. 749. Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way 'justice must satisfy the appearance of justice.' *Offutt v. United States*, 348 U.S. 11, 14, 75 S.Ct. 11, 13, 99 L.Ed. 11."

This right to a fair trial, including the right to an unbiased decision maker, applies to administrative agencies as well as to courts of law. *Chandler v. City of Lanette*, 424 So. 2d 1307, 1310 (Ala. 1982); *Ex parte Greenberg*, 395 So. 2d 1000, 1002 (Ala. 1981). In the case at bar, the City of Jasper was denied the right to voir dire the Civil Service Board members prior to the start of the hearing. (C-191-200). This denial resulted in a failure of the system of justice to insure a detached and neutral tribunal, as well as an impartial trier of fact in this case.

"To effectuate the fundamental right to an impartial jury [trier of fact], courts must permit a meaningful and effective voir dire examination." *Knight v. State*, 1995 Ala. Crim. App. Lexis 243; *McLain v. Routzong*, 608 So. 2d 722, 724 (Ala. 1992). The Civil Service Board of the City of Jasper (hereinafter "the Board") serves as both the trier of fact

and as adjudicator of the matters brought before the Board. See *Act No. 113, Acts of Alabama 1965 (1st Sp. Sess.)* § 14. Thus, an effective voir dire examination of the Board is essential to insure that the fundamental right to an impartial trier of fact and to an unbiased decision-maker is guaranteed.

In the case at bar, the City attorney sought to voir dire the Board members,

> **Mr. Selman:** "Before we proceed any further, I've got some questions I would like to ask the board that are somewhat like jury voir dire questions to see if the board is going to be able to give us a fair hearing in this matter." (C-191).

The Board refused. (C-195). The purpose of voir dire is to ensure that the parties would get a fair hearing. (C-191). Counsel for the City then proffered to the Board the following questions:

> **Mr. Selman:** "Let me tell you, if I may, the questions I intend to ask. It has come to my attention that there has been certain talk that the board has already reached a determination on this matter, it has already been stated that the outcome will be unfavorable to the city. The first question I wanted to ask each of the board members was whether or not they've discussed this matter among themselves or not. And the next question I wanted to ask was whether or not they have already reached a decision or tentative decision, and also I wanted to ask each of the board members if

they had spoken to Mr. Kenneth Burkett or anyone on his behalf either before November 18 or after November 18th." (C-192-193).

.....

Mr. Selman: "Well there are other questions I want to ask them. The first one was, I wanted to ask of Mr. Middleton, what his relationship is to Mr. Burkett. I understand he has some relationship to Ken. I think it would be appropriate to know at this time." (C-195).

.....

Mr. Selman: "I have one other question and it goes to this, in the act it says that the board shall be made up of qualified electors and if a person has been convicted of a crime of moral turpitude, he loses his right to vote and therefore is no longer a qualified elector. It's my understanding that the law in the State of Alabama is that a person who is convicted of a bad check matter is a person who has been convicted of a crime involving moral turpitude, and I would like to ask any of the members of the panel if they have ever been convicted of issuing a worthless check under the Code of Alabama." (C-196).

The Chairman of the Board overruled the City's request for voir dire. (C-192, 195, 196, 199, 200). This overruling of the City's request for voir dire has deprived the City of procedural due process.

The opinion rendered by the Alabama Court of Civil Appeals in this case concerning the issue of voir dire stated that:

> "regardless of whether the City should have been allowed to conduct a voir dire examination of the members of the Board, the City was free to introduce any evidence it had, either at the outset or during the hearing itself, to attempt to demonstrate the risk of bias or prejudice of any of the members.

City of Jasper v. Civil Service Board of the City of Jasper, 1995 Ala. Civ. App. Lexis 571. The Court of Civil Appeals must not have understood the point of the City's request to voir dire the Board.

It has long been recognized that in a trial by jury, voir dire is allowed for the purpose of determining if a potential trier of fact will be biased, prejudiced, or partial to the other party. See *McLain v. Routzong*, 608 So. 2d 722, 724 (Ala. 1992). Since one of the functions of the Board in this matter is to serve as the trier of fact, then voir dire is the proper method by which to examine for possible bias or prejudice of the members of the Board against or in favor of either party.

As to the introduction of evidence during the hearing itself, jurors are not examined for bias that way and administrative board members should not have to be either. Either party must have the right to ask the potential trier of fact if there is any reason that might cause them to be less than fair. No party should be required to prove a trier of fact unfair without the benefit of an adequate voir dire examination. Voir dire is the long recognized "starting place" for this

search. The issue of bias in this instance is further compounded by the fact that *Act No. 113, Acts of Alabama 1965 (1st Sp. Sess.)* § 14(b), provides that "the Board's findings of fact shall be final and conclusive." There is no *de novo* appeal from a decision of this Board.

The Court of Civil Appeals was absolutely correct when it said that "[t]he dispositive issue on the City's appeal is whether the City was afforded [procedural] due process." However, the Court of Civil Appeals misapplied the law to the facts when it cited *Withrow v. Larkin*, 421 U.S. 35, 95 S.Ct. 1456, 43 L.Ed.2d 712 (1975), and its progeny *Board of Dental Examiners v. King*, 364 So. 2d 311 (Ala. Civ. App. 1977), rev'd on other grounds, *Ex parte King*, 364 So. 2d 318 (Ala. 1978), on remand, *Board of Dental Examiners v. King*, 364 So. 2d 319 (Ala. Civ. App. 1978), as authority in the case at bar. The issues, both factually and procedurally, in those cases are altogether different from the issue in this case. In *Withrow*, 95 S.Ct. at 1464, and *Board of Dental Examiners*, 364 So. 2d at 316, the issue was merely whether the combination of investigative and adjudicative functions reposed in administrative agencies necessarily denies due process to those who come before the agency. In the case at bar, the issue is whether denying the City of the right to voir dire the Board has effectively deprived the City of procedural due process. Thus, the precedent espoused in *Withrow* and *Board of Dental Examiners* does not answer the issue raised by the City, and it appears that this issue is one of first impression before this Court.

Every person is entitled to an impartial trier of fact. See *Knight v. State*, 1995 Ala. Crim. App. Lexis 243. To shield those sitting on administrative boards from an effective voir dire examination, based solely upon an assumption that

they must be men of honor fails to satisfy the "appearance of justice" test, and deprives the City and all similarly situated parties of an effective method of ensuring a fair trial before a neutral tribunal and impartial trier of fact.

The Court of Civil Appeals further stated in its ruling that, "...in order to sustain a due process violation, the evidence must show that the risk of bias is intolerably high, or that there is a substantial temptation to prejudge the case.' (citations omitted)." See *City of Jasper v. Civil Service Board of the City of Jasper*, 1995 Ala. Civ. App. Lexis 571.

> **The question begged is, "How does one show an intolerably high risk of bias without first being permitted an effective voir dire examination?"**

In the case at bar, the City was denied the right to voir dire the Board as to the issues of bias or prejudice. Therefore, the City was effectively deprived of the process by which to show that the risk of bias is intolerably high, or that there is a substantial temptation by the Board to prejudge this case.

Furthermore, the appeal to the Circuit Court of Walker County, where testimony was allowed regarding the bias and prejudice of the Board, fails to cure the procedural due process violation which occurred at the original hearing. The City is entitled to due process in the first instance, and the appeal to the Circuit Court is an insufficient "procedural safeguard" to guarantee a fair hearing before the Board. *Ward v. Village of Monroeville, Ohio*, 409 U.S. 57, 61, 93 S.Ct. 80, 83-84, 34 L.Ed.2d 267 (1972).

In *Ward*, 93 S.Ct. at 80-84, the defendant was convicted of two traffic offense in the Mayor's Court. The conviction was held to be a violation of due process because the Mayor had a direct interest in the outcome of the case. *Id.* at 83. The respondent argued that any unfairness that occurred in the Mayor's Court could be corrected on appeal and trial *de novo* in the County Court of Common Pleas. The Supreme Court of the United States disagreed, and stated:

> This "procedural safeguard" does not guarantee a fair trial in the mayor's court; there is nothing to suggest that the incentive to convict would be diminished by the possibility of reversal on appeal. Nor, in any event, may the State's trial court procedure be deemed constitutionally acceptable simply because the State eventually offers a defendant an impartial adjudication. Petitioner is entitled to a neutral and detached judge in the first instance.

Id., 93 S.Ct. at 83-84.

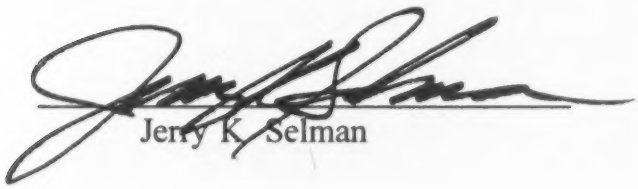
The situation presented to you by the City of Jasper is even more compelling because there is no trial *de novo* from a ruling of this board. The finding of fact made by the Civil Service Board of the City of Jasper, Alabama is **"final and conclusive"** on appeal. *Act No. 113, Acts of Alabama 1965 (1st Sp. Sess.)* § 14(b). There is no second chance to get an impartial adjudication of a matter that begins before this administrative body.

Accordingly, a writ of certiorari should issue out of this court with the result that the Civil Service Board of the City of Jasper, Alabama will be required to allow this party

in this case an effective voir dire examination of the board members, to help insure that an unbiased decision-maker and an impartial trier of fact exists for all parties to this cause.

Respectfully submitted,

SELMAN & SELMAN
ATTORNEYS FOR PETITIONER
P. O. BOX 2388
JASPER, ALABAMA 35502-2388



Jerry K. Selman

APPENDIX

CIVIL SERVICE BOARD

CITY OF JASPER, ALABAMA

IN THE MATTER OF:

KENNETH BURKETT

ORDER

I. FINDING

The Civil Service Board of the City of Jasper, Alabama, after having heard the appeal of Kenneth Burkett, wherein he appealed his dismissal by the Police Department of the City of Jasper, Alabama, on November 18, 1992, and this cause coming on for hearing on December 10, 1992, and it being concluded on December 14, 1992, and the Board having reviewed the transcript, and after deliberating, makes the following findings of fact:

1. The Board finds that Kenneth Burkett was dismissed on the basis of disobeying a direct order and being absent without leave.

2. The Board finds that Kenneth Burkett, pursuant

to the testimony of his immediate supervisor, Captain Argent, filed an absentee report on November 2, 1992, which indicated that he would be on vacation until November 18, 1992. That, pursuant to the policy manual of the Jasper Police Department, vacations are to be taken prior to November 15, 1992. That on October 20, 1992, Kenneth Burkett was present at a supervisors meeting where it was restated that all vacations had to be taken by November 15, 1992. That Kenneth Burkett was called at home by Captain Don Argent on November 2, 1992 and was advised that his vacation extended past November 15, 1992 and was told that there could not be an approval of taking any days past the fifteenth. On November 18, 1992, Kenneth Burkett reported to work and was given a letter to see the Chief concerning possible disciplinary measures. A meeting was held on that night and following the meeting, a letter was given to Kenneth Burkett terminating his employment. That such letter, which had been prepared prior to the meeting, had two alternatives which were (1) to take no action and (2) to terminate his employment.

3. The Board also heard conflicting testimony from Mayor Woods concerning a discussion held with Kenneth Burkett concerning taking part of his vacation after November 15, 1992. The Board finds that such testimony was inconclusive.

4. The Board further finds that, in violation of the policies of the Police Department, two of Kenneth Burkett's subordinates were allowed to split their vacations in order to complete them prior to November 15, 1992. There was also testimony that indicated that if the two days after November 15, 1992 had been considered holidays, there would be no violation of any policy of the Police Department.

5. The Board further finds that the evidence presented by the City of Jasper indicated that Kenneth Burkett had been disciplined for having an unexcused absence only one time before on August 1, 1986 for an unauthorized day off with failure to notify his supervisor.

6. The Board further finds that the City of Jasper has adopted an attendance policy, and that under said policy, a person may have up to five unexcused absences, within a one hundred eighty (180) day period, before any action is taken to discipline an employee.

7. The Board further finds that there was no testimony presented by the City of Jasper of any direct order being addressed to Kenneth Burkett.

II. DECISION

1. Based upon the testimony, a thorough review of the transcript of the hearing, and a review of the applicable laws, the Civil Service Board of the City of Jasper, Alabama, unanimously denies the dismissal of Lieutenant Kenneth Burkett and hereby orders the City of Jasper to immediately restore him to his position of employment with the City and to pay him for all days he was due to be paid between November 16, 1992 and the date of his reinstatement.

2. The Board also strongly suggests that Kenneth Burkett follow the policy adopted by the City concerning the chain of command from this date forward, and if he deems it necessary to see the mayor, if a supervisor will not accompany him, he should bring the matter before the Civil Service Board.

3. The Board directs that a copy of this decision shall be attached to Lieutenant Kenneth Burkett's personnel file and be considered a written reprimand for being absent on November 16 and 17, 1992.

_____
MICHAEL SHUMATE, CHAIRMAN

ATTEST:

_____
WILLIAM PETE KENNEDY, SECRETARY

CASE NUMBER CV-93-067

IN THE

CIRCUIT COURT

OF WALKER COUNTY, ALABAMA

CITY OF JASPER, ALABAMA, ET AL.

VS.

CIVIL SERVICE BOARD OF THE
CITY OF JASPER, ALABAMA, ET AL.

ORDER

This action is presently before the Court upon Plaintiff's Motion for Injunctive Relief, Plaintiff's Petition for Mandamus, Defendant's Motion to Dismiss Appeal, and Defendant's Motion to Quash Writ of Mandamus.

Upon consideration of all applicable statutory and case law, the pleadings, briefs submitted by counsel, and oral arguments heretofore presented, the Court is of the opinion that (1) Plaintiff's appeal is not defective, and should be allowed to proceed; (2) Plaintiff's Petition for Injunctive

Relief and for Writ of Mandamus is an improper remedy and should be disallowed.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that:

(1) The Injunctive Relief sought by the Plaintiff is hereby DENIED;

(2) Plaintiff's Writ of Mandamus is hereby QUASHED;

(3) Plaintiff shall be allowed to proceed in its appeal of the decision of the Civil Service Board of the City of Jasper to the Circuit Court of Walker County, Alabama, as amended.

DONE AND ORDERED, this the 10th day of November, 1993.

_____

CIRCUIT JUDGE

CASE NUMBER CV-93-067

IN THE

CIRCUIT COURT

OF WALKER COUNTY, ALABAMA

CITY OF JASPER, ALABAMA, ET AL.

VS.

CIVIL SERVICE BOARD OF THE
CITY OF JASPER, ALABAMA, ET AL.

ORDER OF JUDGMENT

This is an appeal from an action of the Civil Service Board of the City of Jasper. Also pending is a Motion to Reconsider the City of Jasper's Petition for Injunctive Relief and for Writ of Mandamus, which was denied by this Court on November 10, 1993.

A hearing was held on April 8, 1994 as to all pending issues. All parties were present in Court and represented by their respective attorneys. Oral testimony was heard from several witnesses, certain documents were offered and received into evidence and the Court entertained arguments of counsel. This matter was then taken under advisement by the Court.

The Court has thoroughly read the transcript of the

Civil Service Board Hearing, has considered all the pleadings and evidence presented in the case, and has reviewed the applicable case law.

The duty of the Court in a case such as this is to determine if all parties were afforded due process of law. The Court cannot substitute its judgment for that of the Civil Service Board if, in fact, due process has been afforded. The City of Jasper argues that the Civil Service Board was biased in this case and was not able to give the City a fair hearing.

Upon consideration of all evidence presented and of all the Pleadings herein, the Court finds that the evidence presented by the City of Jasper is insufficient to overturn the decision of the Civil Service Board. While a fair and impartial tribunal is a necessary component of due process, a mere allegation of impropriety on the part of one member of the Board, without substantiation or corroboration, is not sufficient to require reversal of the Board's decision.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the decision of the Civil Service Board of the City of Jasper is hereby upheld and AFFIRMED. Appellant's Motion for Injunctive Relief is accordingly DENIED.

DONE AND ORDERED THIS THE 24th day of May, 1994.

_____

CIRCUIT JUDGE

ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 1995-96

2940115

City of Jasper, Alabama,
a municipal corporation

vs.

Civil Service Board
of the City of Jasper, Alabama, et al.

Appeal from Walker Circuit Court

(CV-93-67)

THIGPEN, Judge

The City of Jasper (City) appeals from the circuit court's ruling upholding the decision of the Civil Service Board of the City of Jasper (Board) restoring Kenneth Burkett to his position as a police officer. The City argues on appeal that the Board erred in refusing to allow the City to conduct a voir dire examination of its members before its hearing to

determine whether any of the members should be disqualified for bias against the City or in favor of Burkett. Additionally, the City argues that one witness's testimony that, before any hearing, she overheard a Board member state that the Board would "put him back to work" was sufficient evidence for the trial court to reverse the findings of the Board and to order a new hearing.

The following facts are pertinent to this appeal: Burkett had been employed as a police officer with the City for approximately 20 years. In October 1992, the chief of police and Burkett's supervisor informed Burkett and other officers that, in accordance with police department guidelines, no vacation periods were to extend beyond November 15, 1992. Subsequently, Burkett extended his vacation two days beyond November 15, and his employment was terminated for being absent without leave and for violating a direct order. Burkett contended that, before his vacation, he had discussed the matter with the mayor and had informed his supervisors that his leave schedule exceeded the November 15 deadline. Burkett contended that the Mayor assured him that no one would lose vacation time. Burkett further claimed that, when he submitted his leave schedule, reflecting leave extending two days past the deadline, to his immediate superior, no objection was made. Upon his return from leave, after being given an opportunity to explain his absence, he was discharged from his employment.

Burkett appealed his discharge to the Board, which held a hearing in December 1992. Subsequently, the Board ordered that Burkett be restored to his position as a police officer; the City appealed to the circuit court.

The City, inter alia, contended before the circuit court

that certain members of the Board had made statements before the December hearing, indicating that they were going to rule in favor of Burkett, or the City contended that making such statements violated the City's right to due process. In addition to appealing to the circuit court, the City also petitioned for a writ of mandamus, asking the court to order the Board to nullify its decision and to remove its present members from the Board for purposes of rehearing the matter of Burkett's employment termination. After much procedural maneuvering, the court held an ore tenus proceeding in April 1994 on the issue of whether the City had proven a denial of due process. At the hearing, the trial court allowed the testimony of the questioned Board member regarding his prior statements and alleged bias, as well as the testimony of another witness who purportedly had heard those statements. In its written order affirming the findings and order of the Board and denying the alternative petition for a writ of mandamus, the trial court noted:

> "The duty of the Court in a case such as this is to determine if all parties were afforded due process of law. The Court cannot substitute its judgment for that of the Civil Service Board if, in fact, due process has been afforded. The City of Jasper argues that the Civil Service Board was biased in this case and was not able to give the City a fair hearing.
>
> "Upon consideration of all evidence presented and of all the Pleadings herein, the Court finds that the evidence presented by the City of Jasper is insufficient to overturn the decision of the Civil Service Board. While a

> fair and impartial tribunal is a necessary component of due process, a mere allegation of impropriety on the part of one member of the Board, without substantiation or corroboration, is not sufficient to require reversal of the Board's decision."

The dispositive issue on the City's appeal to this court is whether the City was afforded due process before the Board. We begin with the basic assumption that "without a showing to the contrary, state administrators 'are assumed to be men of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances.' *United States v. Morgan*, 313 U.S. 409, 421 ... (1941)." *Withrow v. Larkin*, 421 U.S. 35, 55 (1975). This presumption has previously been applied by our appellate courts. *Board of Dental Examiners v. King*, 364 So. 2d 311 (Ala. Civ. App. 1977), rev'd on other grounds, *Ex parte King*, 364 So. 2d 318 (Ala. 1978), on remand, *Board of Dental Examiners v. King*, 364 So. 2d 319 (Ala. Civ. App. 1978).

In order to rebut this presumption, "a party seeking to demonstrate prejudice or antipathy on the part of one or more board members must show at the outset of (or during) the hearings before the board that the risk of bias is intolerably high or such that there is a substantial temptation on the part of the members sitting in their quasi-judicial capacity to pre-judge the case with regard to any issue to be presented (or actually presented) by the party challenging the board's impartiality." *Board of Dental Examiners v. King* at 317. Thus, regardless of whether the City should have been allowed to conduct a voir dire examination of the members of the Board, the City was free to introduce any evidence it had, either at the outset or during the hearing itself, to attempt to

demonstrate the risk of bias or prejudice of any of the members. *Act No. 113, 1965 Ala. Acts (1st Sp. Sess.)*, provided a civil service system for the City; it expressly stated in Section 14.(b) that "the Board's finding of fact[s] shall be final and conclusive." On appeal, the circuit court's review is in the nature of a certiorari review, i.e., the review is limited to the record made before the Board and the questions of law presented. Accordingly, "this court's review is also based on a review of the record made before the Board and we look only to see if its findings are supported by substantial evidence." *Guthrie v. Civil Service Board of City of Jasper*, 342 So. 2d 372, 375 (Ala. Civ. App. 1977). An exception exists, however, where a party attempts to show that the Board's action denied him due process and "boards, as well as courts, must observe that fundamental right. And this may be shown by evidence not included in the transcript of the proceedings before the Board." *Ex parte King*, 364 So. 2d at 318 (Ala. 1978).

Thus, in accordance with these precepts, in addition to its review of the record before the Board, the trial court heard additional testimony from Michael Shumate, a Board member accused of being prejudicial, and Teresa McDonald, a former employee of the police department who is now a security guard, who claimed to have overheard Shumate make prejudicial remarks before the Board's hearing. McDonald testified that before the Board hearing, she was in Shumate's place of employment and stated that he and another Board member, "Skip" Middleton, were going to see that Burkett got his job back. McDonald testified that she heard comments of this type on more than one occasion from Shumate, and that she reported these conversations to the chief of police within a few days after learning that Burkett had been fired. McDonald gave a sworn statement on January 7, 1993. Her

testimony at trial indicated that she had heard Shumate discussing the matter with Burkett, stating in substance that he was working with Middleton to get Burkett's job back. Her prior sworn statement conflicted with her testimony given when she was questioned regarding conversations between Shumate and Burkett. Further, McDonald testified that she was certain that the statements she heard were made between the time that Burkett was fired and the Board hearing in December. She testified, however, that she did not actually know when the hearing was, and that she believed there were two hearings.

Shumate denied telling anyone that he and another Board member were going to ensure that Burkett got his job back, or that he had made any statement indicating a predetermined decision on the matter. He testified that he did not recall discussing the matter with Burkett before the hearing and did not recall the exchange with McDonald, although he did admit that he may have told her that after the Board had heard the case, it would rule, and that if it ruled in Burkett's favor, he would get his job back. He testified that before the hearing, he did not have his mind made up regarding whether Burkett would be restored to his job, and that he and Middleton did not discuss the case before hearing the evidence. He further testified that he had never gone into any case with a predetermined mind, and that he always had an open mind before a hearing.

"In order to sustain a due process violation, the evidence must show that the risk of bias is intolerably high, or that there is a substantial temptation to prejudge the case." *State Tenure Commission v. Randolph County Board of Education*, 523 So. 2d 1076, 1077 (Ala. Civ. App. 1988).

After considering the law and the facts, we cannot say that the risk of bias was intolerably high, or that there was a substantial temptation on the part of the Board to prejudge the case; accordingly, the judgment of the trial court affirming the findings and conclusions of the Board is due to be, and it is hereby, affirmed.

The Board's request for attorney fees is denied.

AFFIRMED.

Robertson, P.J., and Yates, Monroe, and Crawley, JJ., concur.

OFFICE OF
CLERK OF THE COURT OF CIVIL APPEALS
STATE OF ALABAMA
MONTGOMERY

December 1, 1995

Circuit Court No. CV-93-67

RE: 2940115

CITY OF JASPER, ALABAMA, et al.
Appellant

vs.

CIVIL SERVICE BOARD OF THE
CITY OF JASPER, ALABAMA, et al.
Appellee

You are hereby notified that the following indicated action was taken in the above cause by the Court of Civil Appeals:

Application for rehearing overruled. No opinion written on rehearing.

_____
Clerk, Court of Civil
Appeals of Alabama

MAILING ADDRESS:
300 Dexter Avenue
Montgomery, Alabama 36104-3741

IN THE SUPREME COURT OF ALABAMA

April 12, 1996

1950486

Ex parte City of Jasper, Alabama, a municipal corporation. PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS (In re: City of Jasper, Alabama, a municipal corporation v. Civil Service Board of the City of Jasper, Alabama, et al.) (2940115) (Walker: CV-93-67)

CERTIFICATE OF JUDGMENT
Writ Denied

The above cause having been duly submitted, IT IS CONSIDERED AND ORDERED that the petition for writ of certiorari is denied.

KENNEDY, J. - Hooper, CJ., Maddox, Shores and Cook, JJ., concur.